In the High Court of Judicature at Madras

Dated: 05/02/2003

Coram

The Hon'ble Mr.Justice P.D.DINAKARAN

Criminal Appeal No.489 of 1996

T.Stanes and Company Ltd.,
Mixing Unit,
372, Mangalakudiruppu,
Thatchnallur,
Tirunelveli. .. Appellant

-Vs-

State,
rep. by M.M.Mohamad Kasim,
Agricultural Officer
(Plant Protection),
Shenkottai,
Tirunelveli Kattabomman District. .. Respondent

Prayer:- Appeal against the order of sentence dated 27.5.1996 passed by the learned Special District and Sessions Judge, Madurai, in S.T.C.No.20 of 1995.

!For Appellant : Dr.V.Suresh

^For Respondent : Mr.K.V.Jayaprakash Narayanan,
Govt. Advocate (Crl. Side)

:J U D G M E N T

The above appeal is directed against the conviction dated 27.5.1996, made in S.T.C.No.20 of 1995 on the file of the learned Special District and Sessions Judge, Madurai.

2. S.T.C.No.20 of 1995 on the file of the learned Special District and Sessions Judge, Madurai, was tried against four accused, namely, (1)M/s.T.Stanes and Co., (A1), which manufactures fertilizer mixtures; (2) C.Raghavan (A2), who was working as Works Manager in A1 company; (3) M.Kalidevan (A3), who was working as a Chemist in A1 Company and (4) N.S.P.Balasubramaniam (A4), who was appointed as a distributor by A1 Company for the sale of the fertilizer mixtures manufactured by the first accused company. All the accused were charged for the alleged contravention of Section 7(1)(a)(ii) of the Essential Commodities Act read with Clause 19(a) of the Fertilizer (Control) Order, 19 85.

3. The learned Special District and Sessions Judge, Madurai, by judgment dated 27.5.1996, in S.T.C.No.20 of 1995, holding that the charge against A2 to A4 was not proved, acquitted them and held that A1 was guilty of the offence and therefore, convicted A1 for the contravention of Section 7(1)(a) of the Essential Commodities Act read with Clause 19(a) of the Fertilizer (Control) Order and imposed a fine of Rs.5000/-.

4. The case of the prosecution, in brief, is that P.W.1 Bakthavathsalam, on 9.8.1994 at 10.00 a.m., inspected the fertilizer sales unit of A4, who was appointed as a distributor by A1 company, the appellant herein, at 3-2-15, Sasthan Kovil Street, Ayikudi, Shengottai Taluk and found that A4 was in possession of 1320 kgs. of Std. Mixer No.12 manufactured by the appellant (A1) herein. P.W.1 verified the relevant entries in the Stock Register and found that A4, under Invoice No.2 7309 dated 26.7.1994, got delivery of 33 bags of fertilizer mixtures, which were stored in a closed and protected area of go-down from which P.W.1 took a sample of 1.5 kgs. of fertilizer mixtures and sent it for chemical analysis. Three samples were prepared under three different labels containing the details of sample, type, name of the dealer and the manufacturer. The samples were put in the polythene bags and the labels were then put in and stitched tightly, over which the metal seal was affixed. Even though the fourth accused was offered to affix his metal seal, no metal seal was affixed by the fourth accused, as he did not have the meal seal. The fourth accused was given one sample of his own choice. A mahazar (Ex.P.5) was prepared at the spot itself with respect to the drawal of samples of fertilizer mixtures, which contains the signature of A4. Thereafter, A4, certifying that the samples of fertilizer had been drawn in accordance with the procedure prescribed under the Fertilizer Control Order from the stock in his possession, P.W.1 prepared Form 'J' (Ex.P4), which contains the signature of A4. Among the three samples, one was sent for chemical analysis in Form 'K' (Ex.P6). After the chemical analysis, an analysis report (Ex.P7) of the Fertilizer sample was obtained as spoken by P.W.2. As per the report dated 11.10.1994 marked as Ex.P.7, the sample did not satisfy the prescribed standard, as it contained only 12.64% of Nitrogen instead of required 16% of Nitrogen, while the maximum tolerance limit could only be (-)0.6%. Hence, a deficiency of (-)3.36% of Nitrogen in the fertilizer mixture sample was reported in Ex.P7, and based on which, a complaint was lodged by one Mohamed Kasim (P.W.3) in S.T.C.No.20 of 1995 on the file of the learned Special District and Sessions Judge, Madurai.

5.1 On behalf of the prosecution, three witnesses were examined, eleven exhibits were marked and one material object was marked. P.W.1 spoke about the inspection made on 9.8.1994 as well as the verification of stock register, procedures adopted for drawing samples in Form 'J', and sending sample for chemical analysis in Form 'K'; P.W.2, who was working as a Chemist, spoke about the chemical analysis report, marked as Ex.P7 and P.W.3 spoke about the complaint lodged by him before the learned Special District and Sessions Judge, Madurai.

5.2 The prosecution also places reliance on Exs.P1 to P11 as well as M.O.1, of which, the following are relevant to be mentioned;

(1) Ex.P1 : the invoice bearing No.27309 dated 26.7.1994 with respect to the delivery of 33 bags of fertilizer mixture;
(2) Ex.P2 : Stock Register;
(3) Ex.P3 : Entry in the Stock Register with regard to the delivery of 33 bags of fertilizer mixture by A1 to A4;
(4) Ex.P4 : the details regarding drawal of samples in Form 'J';
(5) Ex.P5 : the mahazar prepared at the time of drawing of samples;
(6) Ex.P6 : the details sent along with the sample for chemical analysis in Form 'K';
(7) Ex.P7 : Analysis report of the fertilizer sample; and
(8) M.O1 : one of the samples of fertilizer mixture seized from the premises of A4.

6. Appreciating the evidence of P.Ws.1 to 3 in the light of the documentary evidence, particularly, Exs.P1, P2, P3, P4, P5, P6 and P7, the learned Special District and Sessions Judge, Madurai, held that A1 company is guilty for the contravention of Section 7(1)(a)(ii) of the Essential Commodities Act, 1955 r/w Clause 19(a) of the Fertilizer (Control) Order, 1985; however acquitted A2 to A4, holding that the charge framed against them was not proved. Hence, the above appeal by the first accused.

7.1 Placing reliance on the evidence of P.Ws.1 to 3 and the other documentary evidence, namely, Ex.P4, P5 and P6, Dr.V.Suresh, learned counsel appearing for the appellant, contends that P.W.1 had not followed the procedure as contemplated under Schedule II to the Fertilizer (Control) Order, which prescribes the procedure for drawal of samples of fertilizer mixture.

7.2 In order to substantiate the above contention, Dr.V.Suresh, learned counsel appearing for the appellant, invites my attention to Clause 28(1)(b) of the Fertilizer (Control) Order and Clauses 1(b),(c) & (d), 2(i)(c) and 3(i) of Schedule II to Fertilizer (Control) Order, relating to the procedure for drawal of samples of fertilizer mixture, and contends that the non-compliance of the above procedure for drawal of samples and forwarding the same for chemical analysis vitiates the case of the prosecution.

8.1 In answer to the above contentions, Mr.K.V.Jayaprakash Narayanan, learned Government Advocate (Crl.Side) appearing for the respondent, contends that P.W.1 had correctly followed the procedures prescribed in Schedule II to Fertilizer (Control) Order, for drawal of samples and forwarding the same for chemical analysis.

8.2 Mr.K.V.Jayaprakash Narayanan, learned Government Advocate (Crl. Side), in supporting the order of conviction, contends that the analysis report (Ex.P7) discloses the deficiency of the fertilizer sample from the prescribed standard even after giving the benefit of permissible tolerance, attracting Sections 7(1)(a)(ii) and 10 of the Essential Commodities Act read with Clause 19(a) of the Fertilizer (Control) Order.

9. I have bestowed my careful consideration to the submissions of both sides.

10. The bone of contention of Dr.V.Suresh, learned counsel appearing for the appellant, is that the respondent/complainant had not followed the procedure contemplated under Schedule II to Fertilizer (Control) Order for drawal of samples; but the same is strongly objected to by the learned Government Advocate contending that P.W.1 had rightly followed one of the procedures contemplated under Schedule II to Fertilizer (Control) Order, for drawal of samples for chemical analysis.

11.1 The manifest object of the Essential Commodities Act is to ensure that the common man gets the supply of essential commodities without any hindrance or adulteration. In order to achieve the above legislative intention, the Government, by exercising the powers under Section 6 of the Essential Commodities Act, notified the Fertilizer (Control) Order, 1985.
11.2 Clause 7 of the Fertilizer (Control) Order, 1985, requires registration by the manufacturers and the distributors of the fertilizers before the controlling authority. Clause 19 prescribes certain restrictions on the manufacturers and distributors of fertilizers. In the instant case, we are concerned with Clause 19(a) of the Fertilizer (Control) Order, which reads as follows:
19. "No person shall himself or by any other person on his behalf.
(a) manufacture for sale, sell, offer for sale, stock or exhibit for sale or distribute any fertilizer which is not of prescribed standard;
(b) ..... "

11.3 Clause 28 of the Fertilizer (Control) Order enables the Inspector of Fertilizers appointed under Clause 27 of the Fertilizer (Control) Order by the State or Central Government to inspect any premises with a view to secure compliance of the Fertilizer Control Order; to draw samples of any fertilizer in accordance with the procedure for drawal of samples laid down in Schedule II to Fertilizer (Control) Order; to prepare the sampling details in duplicate in Form 'J', and hand over one copy of the same to the dealer or his representative from whom the samples have been drawn. The power to inspect provided under Clause 28 includes to search any premises where any fertilizer is manufactured or stored or exhibited for sale or distributed and also to seize them in the event of any contravention of the order.

11.4 In this regard, I am obliged to refer some of the relevant clauses of Schedule II to Fertilizer (Control) Order, which prescribes the procedure for drawal of fertilizers, which reads as follows:
"SCHEDULE II
(See clause 28(1)(b) and 29)
PART A
PROCEDURE FOR DRAWAL OF SAMPLES OF FERTILIZERS
1. General requirements of sampling:

In drawing samples, the following measures and precautions should be observed:-
(a) Samples shall not be taken at a place exposed to rain/sun;
(b) The sampling instruments shall be clean and dry when used;
(c) The material being sampled, the sampling instrument and the bags

of samples should be free from any adventitious contaminations:-
(d) To draw a representative sample, the contents of each bag selected for sampling should be mixed as thoroughly as possible by suitable means;
(e)...
(f)..."

Clause 2 to Schedule II:-

(i) Scale of sampling:-

(a) Lot (for manufactures)

All bags in a single consignment of the material of the same grade and type drawn from a single batch of the manufacture shall constitute a lot. If a consignment is declared to consist of different batches of manufacture, all the bags of each batch shall constitute a separate lot.
In the case of a consignment drawn from a continuous process, 2000 bags (or 100 tonnes) of the material shall constitute a lot.
(b) Lot (for dealers)
The lot is an identifiable quantity of same grade and type of fertilizer stored at an identifiable place subject to a maximum limit of 1 00 tonnes.

The lot shall be identified by the inspector based on visible appearance of bags, their packing and storage conditions. The stock of less than 100 tonnes with a dealer may also constitute one or more lots, if the material (fertilizer) of different sources and brand is available in such quantities.
(c) Selection of bags for sampling:
The number of bags to be chosen from a lot shall depend upon the size of the lot as given in the table below:

.....
Lot size (No. of bags) (N) No. of bags to be selected for sampling (n)
.....
Less than 10 1
10-100 2
100-200 3
200-400 4
400-600 5
600-800 6
800-1000 7
1000-1300 8
1300-1600 9
1600-2000 10
.....

All the bags of a lot should be arranged in a systematic manner.
Start counting from any bag randomly, go on counting as 1,2,3,... upto r and

so on, r being equal to be integral of N/n. Thus every rth bag counted shall be withdrawn and all bags shall constitute the sample bags from where the sample is to be drawn for preparing a composite sample.

(ii) Sampling from big godowns/high stackings:

If the procedure given in para 2(i)(c) is not possible to be adopted, the sample should be drawn from the randomly selected fertilizer bags from different layers, from top and from all open sides in a zig zag fashion.

11.5 While Dr.V.Suresh, learned counsel appearing for the appellant, contends that the procedure contemplated under Clauses 1(b)(c) & (d) and 2(i) to Schedule II of Fertilizer (Control) Order, had not been followed in the instant case, Mr.K.V.Jayapr h Narayanan, learned Government Advocate (Crl. Side), per contra, contends that the evidence of P.W.1 clearly shows that he had followed the procedure contemplated under Clause 1(b)(c) & (d) as well as Clause 2(ii) of Schedule II to Fertilizer (Control) Order.

11.6 The contravention of any of the provisions of the Fertilizer (Control) Order is punishable under Section 7(1)(a)(ii) of the Essential Commodities Act and the appellant, being the Company in the instant case, is punishable for the contravention of the provision of the Fertilizer (Control) Order under Section 7(1)(a)(ii) read with Section 10 of the Essential Commodities Act.

11.7 The question that arises for my consideration in the instant case is that whether the order of conviction dated 27.5.1996 passed against the appellant company for the alleged contravention of clause 19 (a) of the Fertilizer (Control) Order is sustainable in law. Assailing the order of conviction and the punishment imposed, Dr.V.Suresh, learned counsel appearing for the appellant, submits that non compliance of the procedure in drawing samples vitiates the case of the prosecution.

11.8 As already referred to above, if the manufacturer, namely, the appellant fails to maintain the prescribed standard in fertilizer as contemplated under Clause 19(a) of the Fertilizer (Control) Order, the Inspecting Officer is empowered to inspect the premises, collect the samples and send them for chemical analysis and if satisfied that the fertilizer manufactured and sold is not in accordance with the prescribed standard, it is punishable under Section 7(1)(a)(ii) read with Section 10 of the Essential Commodities Act. It is under this context, Mr.V.Suresh, learned counsel appearing for the appellant, contends that to charge the appellant company for the contravention of Clause 19(a) of the Fertilizer (Control) Order, the sample relied upon for the above charge should have been collected in accordance with the procedures contemplated under Schedule II to Fertilizer (Control) Order.

11.9 It is true that the Inspecting Officer, namely, P.W.1 is bound by the procedure prescribed under Schedule II to Fertilizer (Control) Order, for drawal of samples and forwarding the same for chemicals analysis. As per

clause 1(b),(c)&(d) of Schedule II, the sampling instrument and the bags of samples should be free from any adventitious contaminations and to draw a representative sample, the contents of each bag selected for sampling should be mixed as thoroughly as possible by suitable means, which is prescribed under Clause (2) of Schedule II.

11.10 No doubt, in the complaint, P.W.3 had stated that the samples were collected as follows:
"A vacant place in the premises was cleaned and a clean dry polythene sheet was spread over. The bags selected were opened and the mixture was spread out and was mixed well and flattened and was divided into four equal parts. Two parts diagonally opposite were removed and the remaining two parts were thoroughly mix together and two parts diagonally opposite were taken. This procedure was followed till the two diagonally opposite two parts were about 1.5 kgs. in weight.

The said 1.5 kgs. was again well mixed and divided into 3 equal parts and then were transferred into three clean dry thick gauged polythene bags and tied air tightly. Then the M.Bakthavathsalam (Witness No.1) prepared three lables containing details of sample, type, brand, name of the dealer and manufacturer and his name. The samples in polythene bags and labels were then put in a cloth bag and stitched tightly and he affixed his metal seal. The fourth accused was offered to affix his metal seal. No metal seal of the fourth accused was offered since he has no metal seal of himself. Identifiable details were also written on all the three bags. The fourth accused was given one sample on his choice. The mahazar was written at the spot itself containing the details of drawing of the same. A copy of the mahazar was given to the dealer and acknowledgement was made in the mahazar.

The Form 'J' was prepared at the spot and the fourth accused signed the Form 'J' and he was given one copy and acknowledgement was received for the receipt of one sample and the Form 'J'."

However, in the evidence, as pointed out by Dr.V.Suresh, learned counsel appearing for the appellant, P.W.1 had stated that out of 33 bags of fertilizer, he had selected two bags in random. Dr.V.Suresh, learned counsel for the appellant, pointing out the said contradiction as to the procedure followed for drawal of samples, submits that P.W.1 had not followed the procedure as mentioned in the complaint and his further contention is that the selection of two bags out of 33 bags in random is a gross violation of Clause 2(i) of Schedule II to Fertilizer (Control) Order.

11.11 Even though the submissions of Dr.V.Suresh, learned counsel for the appellant, are impressive and quite attractive, I am unable to reject the case of the prosecution merely on the basis of non compliance of the procedure required under Clause 2(i) of Schedule II to Fertilizer (Control) Order, because,
(i) the statement made in the complaint by P.W.3 alone need not be looked into to try the charge, particularly when the case is unfolded based on the evidence of P.W.1, who inspected the impugned premises, collected the samples, prepared mahazar (Ex.P5) after preparing the details as contemplated

under Form 'J' (Ex.P4) and forwarded the same for chemical analysis under Form 'K' (Ex.P6);

(ii) when the charge levelled against the appellant could be substantiated with the evidence of P.W.1, I do not think that the averments made in the complaint lodged by P.W.3 itself would vitiate the case of the prosecution;

(iii) a closure scrutinisation of the evidence of P.W.1 reveals that he had selected 2 bags out of 33 bags in random, which is permissible under Clause 2(ii) of Schedule II to Fertilizer (Control) Order;

(iv) the procedure prescribed under Clause 1(b)(c) & (d) of Schedule II to Fertilizer (Control) Order, referred to above, for drawal of samples, only gives certain guidelines to the Inspecting Officer, so that due diligence is taken by the Inspector to see that the sample instruments are clean, dry and free from any adventitious contaminations and the representative sample should be out of the samples thoroughly mixed. In the instant case, for want of sampling probe, P.W.1 had used his own hands and therefore, it cannot be said that the hands used by P.W.1 for mixing the sample fertilizer are not clean, dry and free from any adventitious contaminations. The procedure prescribed under Clause 1(b)(c) & (d) of Schedule II is only to make sure that the sampling instrument is clean, dry and free from any adventitious contaminations. The use of hands by the Inspecting Officer in unavoidable circumstances, for want of sampling probe, therefore, cannot be said to be a serious violation to Clause 1(b)(c) & (d) of Schedule II to Fertilizer (control) Order.

(v) that apart, A4 himself had certified in Form 'J' (Ex.P4) that the samples of fertilizer had been drawn in accordance with the procedure prescribed under the Fertilizer (Control) Order from the stock in his possession; and

(vi) In any event, the analysis report of the fertilizer sample (Ex.P7), as spoken by P.W.2, discloses that the fertilizer sample contained only 12.64% of Nitrogen instead of 16% Nitrogen, as required under the prescribed standard, and even after giving the benefit of maximum tolerance limit of (-)0.6%, the sample fertilizer suffers from the deficiency of (-)3.36% Nitrogen and the said violation attracts Clause 19(a) of the

Fertilizer (Control) Order. The evidence of P.W.2 is based on the analysis report (Ex.P7), which being an expert opinion, cannot be assailed on any ground.

(vii) it is a trite law that the procedure prescribed for drawal of samples are nothing, but directory and not mandatory and the Inspectors should take care to see that they comply with the rules as far as possible, as observed by the Apex Court in State of Kerala etc. vs. Alaserry Mohammed etc., reported in 1978 (1) FAC 145.

11.12 The mere non-compliance of the procedure contemplated under

Clause 2(i) of Schedule II to Fertilizer (Control) Order, therefore, in my considered opinion, will not vitiate the case of the prosecution; and

11.13 P.W.1 had followed one of the procedures prescribed under Schedule II to Fertilizer (Control) Order, in which event, it may not be proper for this Court to interfere with the order of conviction and the punishment imposed, particularly, when the analysis report (Ex.P7) declares that the sample suffers from deficiency of prescribed standard, attracting Clause 19(a) of the Fertilizer (Control) Order, which is punishable under Section 7(1)(a)(ii) read with Section 10 of the Essential commodities Act.

12. In the result, the appeal fails and the same is dismissed.

Index : Yes
Internet: Yes
ATR

To:
1. The Special District and Sessions Judge,
Madurai.

2. The Public Prosecutor,
Madras.